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IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS' ASSOCIATION,

Plaintiff,

v.

CITY OF SAN JOSE AND BOARD OF ADMINISTRATION FOR THE POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE,

Defendants.

AND RELATED CROSS-COMPLAINT AND CONSOLIDATED ACTIONS

Case No. 1-12-CV-225926

(and Consolidated Actions 1-12-CV-225928, 1-12-CV-226570, 1-12-CV-226574, and 1-12-CV-227864)

OPPOSITION TO MOTIONS IN LIMINE OF DEFENDANT CITY OF SAN JOSE BY PLAINTIFFS SAPIEN, ET AL., HARRIS, ET AL., AND MUKHAR, ET AL.,

Pre Trial Date: July 12, 2013
Time: 9:00 a.m.
Dept: 2
Judge: Hon. Patricia M. Lucas

Trial Date: July 22, 2013

Plaintiffs oppose Defendant's Motions in Limine Nos. 1, 2(c) 4, 5, 6, 7, and 8 for the reasons set forth below.

Opposition to In Limine Motion No. 1

Plaintiffs oppose this motion unless the court determines that all evidence available to the City and the public concerning the extent of the unfunded liability is excluded by the court. To the extent any evidence proffered by the City concerning the extent and/or effect of the pension funds' unfunded liability, the published statements of the mayor concerning this subject, later found to be untrue, is evidence which goes to the credibility of the City's evidence and should be admitted.

Opposition to In Limine Motion No. 5

Defendant misperceives the limited purpose for which plaintiffs will request judicial notice of complaints filed by the Public Employment Relations Brand ("PERB"). The filing of the complaints is relevant only to show that PERB has accepted jurisdiction of the issue of whether or not the City negotiated in good faith before submitting Measure B for approval of the voters.

Thus, any claim by the City that it bargained in good faith with its unions over the provisions of Measure B is for PERB, not this Court to decide. *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal4th 597, 601; *City of San Jose v. US IAFF Local 230* (2009) 178 Cal.App.4th 408, 414.

Opposition to In Limine Motion No. 6

In their depositions, Plaintiffs Harris, Sapien, and Mukhar were asked questions which called for answers that would require applying legal theory to facts supporting the Plaintiffs' contentions. While such questions are appropriate in the form of interrogatories, the same are not appropriate for a deposition of a lay person. *Pember v. Superior Court* (1967) 66 Cal.2d 601, 604; *Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255, 1262.

> Even if such questions may be characterized as not calling for a legal opinion (see *singer v. Superior Court, supra,* 54 Cal.2d at p. 326, 5 Cal.Rptr. 697, 353 P.2d 305), or as presenting a mixed question of law and fact (see 4A Moore's Federal Practice (2d ed.) § 33.17[2]. P. 33-85), their basic vice when used at a deposition is that they are unfair. They call upon the deponent to sort out the factual material in the case according to specific legal contentions, and to do this by memory and on the spot. There is no legitimate

> reason to put the deponent to that exercise. If the deposing party wants to know facts, it can ask for facts; if it wants to know what the adverse party is contending, or how it rationalized the facts as supporting a contention, it may ask that question in an interrogatory. The party answering the interrogatory may then, with aid of counsel, apply the legal reasoning involved in marshaling the facts relied upon for each of its contentions. In *Pember* at 604.

In each deposition, appropriate objections were made and the witnesses, on instruction, did not answer.

Defendant now claims that these witnesses should not be allowed to testify (apparently not just limited to the subject matter of the questions asked).

Defendant cites two cases in support of its motion. *Thoreau v. Johnson & Washer* (1972) 29 CA.3d 270 and *Dexter v. Angus* (1986) 179 Cal.App.3d 341. Neither case supports Defendant's position. In both cases the courts found that written discovery responses were intentionally false and misleading which caused the opposing party to be prejudiced. Here, Defendant was not misled nor was it deprived of information. If Defendant felt the objections were not legally sound, it could have filed a motion pursuant to CCP §§2025.470 and 2025.480. Or, as instructed by *Pember*, *supra*, or as suggested by deponents' counsel, Defendant could have submitted the questions by written interrogatory. Defendant chose to do neither and should not now be heard to complain.

Opposition to In Limine Motion 7

The Plaintiffs do not oppose Defendant's Motions in Limine No. 7 so as long as the order precluding legal opinion is mutually applicable.

Opposition to In Limine Motions 2(c), 4, and 8

> Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity. Evid. Code §1220.
>
> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:
>
> The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and
>
> The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof,

subject to the admission of such evidence. Evid. Code §1222.

Defendant's primary defense in these consolidated actions is that the two employee retirement plans do not, as a matter of law, create vested contractual rights for employees and retirees. A subsidiary issue is Defendant's assertion that the plans do not make the unfunded liability the sole responsibility of the City. Defendant takes its position notwithstanding the facts that on various occasions authorized representatives of the City have stated that the plans provide vested contractual rights and/or that the unfunded actuarial liabilities are the sole responsibility of the City. These admissions include statements by the oral and written arguments presented by Deputy City Attorneys representing the City in binding interest arbitration under the Meyers-Milias-Brown Act (Govt. Code §3500), in written communications from two City managers to City employees and in a report to the Board of Administrations of the Police & Fire Department. (See Exhibits 1-6 attached to Declaration of Christopher E. Platten (CEP Decl.) in opposition to Defendant City of San Jose's Motion In Limine, as well as proposed Exhibit 24 attached to Declaration of John McBride.)

Each of the statements Defendant objects to represents admissions. Susan Devencenzi, then a Deputy City Attorney and counsel to the Board of Administration of the Police & Fire Department Retirement Plan; submitted a written report to the Board in December of 1997 in which she explains the actuarial functions of the plan and how it affects the unfunded actuarial accrued liability of the plan. In this report, she confirms that the liability for the unfunded actuarial accrued liability has always been allocated to the City specifically under the terms of the retirement plan. The statement by Ms. Devencenzi is admissible as an admission that is directly relevant to the sub-issue of whether the City is solely liable for the unfunded actuarial liability. In addition she confirms that this allocation of liability could only be changed by amendment to the City Charter provisions which constitute the retirement plan and which change could only be accomplished through negotiation with the employee organizations. (See page 13, 14 and 15 of Sapien et al.'s proposed Exhibit 24.)

The statements made by Ms. Devencenzi to the Board of Administration demonstrate her authority, i.e. as a Deputy City Attorney she was responding to an inquiry from the Board of Administration.

Exhibit 1 attached to the CEP Decl. is a transcript of a presentation by an Assistant City

Attorney in a binding interest arbitration in which he admits that the City must cover unfunded liabilities and explicitly references the vested nature of the pension plans. ("Because retirement benefits, once given, can never be taken away...you can only take them away only if given comparable benefits.") **Exhibits 2, 3 and 4** to CEP Decl. are legal briefs filed by the City Attorney in the same arbitration which also contain admissions regarding the vested nature of the pension benefits. **Exhibit 5** is a statement made under oath in another binding interest arbitration by a City official admitting the City's liability for unfunded liabilities. Exhibit 6 is testimony from another arbitration in which an expert testified on behalf of the City confirmed that he had been given the interpretation of the City Code that contained conclusions that the City was "fully responsible under the code for payment of that unfounded liability."

The statements are admissible evidence as an exception to the hearsay rule under Evidence Code §1220, first: because each is relevant to the issue in this case, to wit: the vested nature of the pension rights and the City's responsibility for the unfunded actuarially accrued liabilities. An admission under the evidence code becomes relevant when the statement asserts facts to provide some portion of the proponent's claim or rebut some portion of the declarant's claim, *Carson v. Facilities Dec. Co.* (1984) 36 Cal. 3d 830, 849; and second, because the circumstances of each statement indicate the authority of the person making the statement either directly or impliedly. "The authority of a declarant employee to make a statement 'for an employer concerning the subject matter of the statement' can be implied as well as express." *O'Mary v. Mitsubishi Electronics American Inc.* (1997) (Rev. denied 2/18/98) 59 Cal. App. 4th 563, 570.[1] Statements made by lawyers of the City Attorney in arbitration proceedings clearly are authorized.[2] So too the testimony of an expert on behalf of the City was not only authorized, but adopted by the City by reason of submission of that testimony in an arbitration. Deputy City Attorney indicates her authority i.e. she was responding to an inquiry by the Board. Each statement should be admitted.

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[1] The admissions directly rebut Defendant's claim that that the two pension plans do not create vested rights. It would be anomalous in separate proceedings to urge as a fact two diametrically inconsistent positions.

[2] Similarly statements made by a Deputy city Attorney in her official capacity as counsel to the Board of Administration responding to an inquiry from the Board cannot be dismissed as unauthorized.

In Defendant's Motion In Limine No. 4, Defendant seeks to exclude a memorandum authored by the City Manager Debra Figone and distributed to current and former employees in which she states that retiree health care benefits "can be considered a 'vested' benefit similar to the pension benefit itself." The City argues that it will prove that Measure B did not alter vested benefits because it "will prove that the various bargaining units and the City previously agreed to the contributions set forth in Measure B, demonstrating that Measure B did not alter any vested benefits." This argument fails for two reasons.

First, the motion asks the court to assume as true that which Defendant argues it will prove. Plaintiffs dispute that Measure B does not alter vested health care benefits. Thus, the status of the benefits is relevant and an admission that those benefit rights are vested is relevant. Second, the statement by the City Manager also contains an admission of the vested nature of the pension benefits ("health care benefits can be considered a 'vested' benefit *similar to the pension benefit itself*") (emphasis added). Thus, Ms. Figone's statement goes beyond health care benefits and constitutes an admission regarding the pension benefits.

Defendant's Motion In Limine No. 8 also deals with a memorandum from the City Manager confirming that the City is responsible for "100% of the unfunded liability. There should be no argument that a City Manager is not authorized to make statements, which constitute admissions on behalf of the City.

For the reasons set forth above, these statements are relevant, authorized and admissible under Evidence Code §1220 and 1222. To the extent that Defendant will not stipulate to the authenticity and foundation. Plaintiffs will provide witnesses to provide the same.

Dated: July 8, 2013

WYLIE, McBRIDE,
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